IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

DANIEL BARNES,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	CIVIL ACTION NO. 3:01-cv-72
	:	
THE HARTFORD AND CONTINENTAL CASUALTY CO.	:	
	:	
	:	
Defendant.	:	

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT AGAINST CONTINENTAL CASUALTY COMPANY

Defendant Hartford Life and Accident Insurance Company ("Hartford"), incorrectly named in the case caption as The Hartford and Continental Casualty Company, responds to Plaintiff's Motion for Default Judgment Against Continental Casualty Company as follows:

1. Admits.

2. Admits.

3. Admits.

4. Admits in part and denies in part. Hartford admits that it has not yet filed a responsive pleading. Hartford denies that it is required to do so. Hartford has not made this filing because it reached an agreement with counsel for Plaintiff's counsel to extend the time which to make such a filing. The purpose of

the extension was to permit the parties to address by stipulation rather than motion practice the multiple defects in plaintiff's complaint.

First, plaintiff named the wrong defendant. The parties were working to resolve this issue with a stipulation to amend the caption to change the named defendant to Hartford Life and Accident Insurance Company.

Second, Plaintiff's complaint is defective because it includes a demand for a jury which is improper. *See* Tingler v. Unum Life Ins. Co. of Am., Mo. 6:02-1285, 2003 U.S. Dist. LEXIS 5455, Starr 17 (S.D.W.V. Apr. 2, 2003) (Plaintiff's are not entitled to a jury trial for ERISA claims.)

5. Third, Plaintiff's complaint is defective because it includes a request for extra-contractual damages which are not available under ERISA. *Tingler v. Unum Life Ins. Co. of Am*., No. 6:02-1285, 2003 U.S. Dist. LEXIS 5455, *16 (S.D.W.V. Apr. 2, 2003), *citing Mass. Mut. Life Ins. C. v. Russell*, 473 U.S. 134, 148 (1985)("It is well-established case law that extra-contractual damages are not available under ERISA.")

To avoid unnecessary motion practice, the parties had worked on a stipulation to amend the caption, to remove Plaintiff's claim for extra-contractual damages, and to remove Plaintiff's demand for a jury trial. While the parties were working out these issues, Plaintiff's counsel had agreed to an extension of time for

Hartford to respond to the Complaint. *See* e-mail of John Hansberry, Esq., to Kenneth Ford, Esq., dated September 2, 2010 (attached as "Exhibit A").

At the request of Plaintiff's counsel, Hartford had provided legal authority for the proposition that Plaintiff was not entitled to a jury demand and was not entitled to extra contractual damages under ERISA. *See* e-mail of John Hansberry, Esq., to Kenneth Ford, Esq., dated September 2, 2010 (attached as "Exhibit B").

At the further request of Plaintiff's counsel, counsel for Hartford prepared a stipulation to dismiss the claim for extra contractual damages, dismiss the jury demand and amend the caption. Although counsel for Barnes had agreed to dismiss the claim for extra-contractual damages and to amend the caption to name the correct party (thereby dismissing Continental Casualty Company and changing The Hartford to Hartford Life and Accident Insurance Company , he had not yet received authority from his client to agree to the dismissal of the jury demand. *See* e-mail of John Hansberry, Esq., to Kenneth Ford, Esq., dated September 20, 2010 (attached as "Exhibit C"). Accordingly, Hartford was waiting to hear from Plaintiff's counsel as to whether his client had agreed to this final piece of the stipulation or whether the parties would stipulate only to change the caption and dismiss the extra-contractual damages claim and require Hartford to file a motion to strike the jury demand.

Despite multiple follow up by counsel for Hartford, Plaintiff still has not yet confirmed whether his client will agree to the dismissal of the jury demand or whether Hartford will be required to file a motion. Consistent with the Agreement between the parties, Hartford did not file a motion, relying, instead, on the extension to respond provided by counsel for Barnes.

6. Admits that Plaintiff has quoted a portion of Rule 55 correctly. Deny that Plaintiff is entitled to a default judgment.

7. Denied. To the contrary, because of the Agreement with Plaintiff's counsel that Hartford was under no obligation to respond to the Complaint until Plaintiff's counsel was able to confirm whether Plaintiff would be willing to agree to remove the jury demand or whether Hartford would be required to move to strike the jury demand, Plaintiff is not entitled to any default judgment.

8. Denied that a hearing should be held on this matter. To the contrary, Plaintiff's request for a default judgment should be denied.

November 16, 2010

Respectfully submitted,

/s/ John C. Hansberry
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Attorney for Defendant Hartford Life and Accident Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2010 a true and correct copy of the foregoing Stipulation was served via the Court's electronic filing system, upon the following:

Kenneth J. Ford, Esquire
100 Mahogany Court
Martinsburg, WV 25404

/s/ John C. Hansberry